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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 61

NAT YANISH and JOHN DIAZ, *Petitioners*

v.

BRUCE G. BARBER, INDIVIDUALLY, and as DISTRICT DIRECTOR, 13TH IMMIGRATION DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 66-68) is not yet reported. A prior opinion of the Court of Appeals (R. 26-27) is reported at 181 F. 2d 492. The first opinion of the District Court (R. 20-23)

is reported at 81 F. Supp. 499; the order of the District Court after remand by the Court of Appeals (R. 58) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 28, 1952 (R. 68-69). A petition for rehearing was denied April 4, 1952 (R. 69). The petition for a writ of certiorari was filed May 12, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the deportation hearings in this case, which did not conform in all respects with the Administrative Procedure Act, satisfied the requirements of procedural due process.

STATUTE INVOLVED

The Supplemental Appropriations Act, 1951 (Pub. L. 843, 81st Cong.), 64 Stat. 1048, provides:

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007).

STATEMENT

In October 1948, petitioners Yanish and Diaz, together with four other aliens no longer involved in this case, filed in the District Court for the

Northern District of California a "Complaint for Review of Agency Action and for Injunctive Relief" against the District Director of the Immigration and Naturalization Service for District Thirteen.[1] The complaint alleged that petitioners had each been served with a deportation warrant of arrest, and had objected to the conduct of the proposed deportation hearings on the ground that the Presiding Inspector assigned thereto had not been appointed pursuant to Section 11 of the Administrative Procedure Act, 5 U.S.C. 1010 (hereinafter called APA), and did not possess the qualifications and authority required under Sections 5, 7 and 8 of that Act, 5 U.S.C. 1004, 1006, 1007. There was no allegation in the complaint as to the date of service of any of the warrants of arrest. In addition to praying for interim relief, petitioners sought a permanent injunction restraining respondent from conducting deportation proceedings against them, except before a hearing officer appointed and acting in the manner required by the APA. (R. 3-10.)

The District Court granted respondent's motion to dismiss on the ground that the APA was inapplicable to deportation proceedings (R. 19-23). While petitioner's appeal to the Court of Appeals for the Ninth Circuit was pending, this Court held,

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[1] Respondent assumed the office of District Director after the case was instituted, and was substituted for the original defendant. For convenience, no distinction is made between acts of respondent and those of his predecessor.

in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, that the hearing provisions of the APA governed deportation proceedings. Effective March 10, 1950, the deportation regulations were amended to conform to that decision (15 F. Reg. 1297-1302). On April 24, 1950, the Court of Appeals filed a *per curiam* opinion reversing the judgment of the District Court "with instructions to grant the relief prayed for in the complaint, or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate" (R. 26-27). On May 25, 1950, the mandate was filed in conformity with the opinion (R. 23-25).

On the day the mandate was entered, respondent filed a motion for leave to answer with respect to Yanish (R. 28-30), and the motion was later amended to request leave to answer as to Diaz, also (R. 44-45). The principal object of the motion was to permit respondent to set forth, by answer, the defense that, under Section 12 of the APA, 5 U.S.C. 1011, compliance with the hearing requirements of the Act was not mandatory, since the deportation warrant of arrest in each instance had been served prior to September 11, 1946, the earliest date any provision of the Act became effective. In support of the motion, as to Yanish, the Assistant District Adjudications Officer for the Service submitted an affidavit (R. 30-40) stating that the deportation warrant of arrest charging him with being in the United States in violation of the Act of

October 16, 1918, as amended, 8 U.S.C. 137, had been issued and served on April 11 and May 21, 1946, respectively; that affiant presided at the administrative hearings which began February 26, 1948; that at the seven hearings held in regard to Yanish various persons other than affiant presented the Government's case as examining inspectors; that on February 14, 1950, affiant prepared an opinion in the case, including a proposed order directing Yanish's deportation to Russia, but that the opinion and record in the hearing had not been submitted to the Commissioner of Immigration and Naturalization because of the instant action. Another affidavit by an immigration inspector (R. 46-53) recited that as to Diaz the deportation warrant of arrest, also charging him with being in the United States in violation of the 1918 act, had been issued and served on July 24 and October 25, 1934, respectively; that following hearings in 1934 and 1935, a warrant of deportation, directing his deportation to Spain, had been issued in 1936; that on September 3, 1947, the Board of Immigration Appeals had ordered the warrant of deportation withdrawn and the case remanded to the service for further hearings; that the hearings had been reopened on June 29, 1949; that at the six hearings held in regard to Diaz affiant had presented the Government's case as examining inspector; that on February 28, 1950, the presiding inspector had prepared an opinion recommending that the depor-

tation warrant of arrest be cancelled and that the proceedings be closed; and that no decision on this matter had yet been received from the commissioner.

On July 27, 1950, six months after hearings as to both men had been completed, the District Court denied respondent's motion for leave to answer (R. 58) and filed a permanent injunction restraining respondent from initiating or conducting proceedings seeking the deportation of petitioners without compliance with the act.

On September 11, 1950, respondent filed a notice of appeal from this judgment.

Between the date of the issuance of the injunction and the second decision by the Court of Appeals, several changes were made in the controlling law and regulations. On July 31, 1950, the deportation regulations, as amended in compliance with the *Sung* decision, were further amended by the addition of a section which made the new regulations inapplicable to hearings held prior to March 10, 1950, under warrants of arrest served prior to September 11, 1946. 15 F. Reg. 5042, 8 C.F.R. (1951 Cum. Supp.) 151.10. On September 27, 1950, the Supplemental Appropriation Act, Pub. L. 843, 81st Cong., was enacted, containing a provision exempting deportation hearings from the hearing provisions of the APA. Effective November 10, 1950, the deportation regulations were revised to conform to the statutory provision, 15 F. Reg. 7636, 8 C.F.R. (1951 Cum. Supp.) § 151. The

revised regulations repealed Section 151.10, *supra*, but provided that the regulations adopted after the *Sung* decision were to apply only to proceedings instituted after September 11, 1946, the effective date of the Administrative Procedure Act, and concluded prior to September 27, 1950, the date of the statutory change exempting deportation proceedings from the coverage of that Act.

On February 28, 1952, the Court of Appeals rendered its judgment remanding the cause to the District Court with instructions to vacate the permanent injunction and dismiss the cause. The court based its decision exclusively on the statutory change produced by the Supplemental Appropriation Act, *supra*.

ARGUMENT

This petition seeks review of the judgment of the Court of Appeals for the Ninth Circuit ordering the District Court for the Northern District of California to vacate an injunction restraining respondent from conducting deportation proceedings against petitioners that do not conform fully with the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.* The administrative hearings are now completed, and, in fact, were finished six months before the permanent injunction was issued, so that it is evident that petitioners are really seeking a determination of the validity of the already completed hearings. Since the recommendations of the Presiding Inspectors have not yet

been acted upon by the Commissioner of Immigration and Naturalization (R. 39, 53), it would seem clear that the doctrine of "exhaustion of administrative remedies" bars consideration of the question at this time. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Riss & Company* v. *Interstate Commerce Commission*, 179 F. 2d 810 (C.A. D.C.). The application of that doctrine is peculiarly appropriate here since the presiding inspector has recommended cancellation of the Diaz warrant of arrest (R. 52).

Petitioners contend, however, that the original decision and mandate of the Court of Appeals, pursuant to which the District Court granted a permanent injunction, was an adjudication of the invalidity of the hearings and that the subsequent enactment of the Supplemental Appropriations Act could not confer validity upon them. However, the only issue then before the court was whether deportation proceedings in general were subject to the APA; no question had yet been raised as to the applicability of the act to petitioners, against whom proceedings had been instituted prior to the effective date of the act.[3] The mandate, which ordered

[3] The first Court of Appeals opinion interpreted the regulations issued after the *Sung* decision as applying irrespective of the time when the proceedings were instituted, but this observation was extraneous to the issue then under consideration, and can not stand as an adjudication. Moreover, as stated in the text, *infra*, p. 9, this Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, expressly held that APA does not apply to proceedings instituted before its effective date.

the District Court to grant the relief prayed for in the complaint "or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate," left that question open for later determination. However, relying on the Supplemental Appropriations Act, the Court of Appeals ordered vacation of the injunction without making any ruling as to the initial applicability of the APA to petitioners. That it was not applicable is made clear by the decision of this Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583, holding that proceedings instituted before the effective date of the Act, such as those in this case, need not conform to its requirements.

Therefore, having no statutory right to a hearing as prescribed by the APA, petitioners' chief argument is that the procedure followed in these hearings, and now in effect authorized in deportation proceedings by the Supplemental Appropriations Act, departs from constitutional standards of fairness. They rely on language in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, which suggests that hearings not conforming to the Administrative Procedure Act might not measure up to constitutional standards of fairness. 339 U. S. at 50. Elsewhere in the opinion, however, it was observed that if inclusion of the immigration agencies within the coverage of the Act was erroneous, "relief from Congress is a simple matter" p. 47, an explicit recognition that suitably fair procedures could be had without compliance with the Act. The

fact that Congress promptly acted to exempt deportation proceedings from the provisions of the Act is evidence of Congress' belief that the Administrative Procedure Act provided safeguards considerably beyond the constitutional minima; and that belief was well-founded as is demonstrated by the long history of judicial approval of deportation proceedings prior to the Act. Standards of fairness are set out in *Tisi* v. *Tod,* 264 U. S. 131, where this Court held that unless there is error "so flagrant as to convince a court that the hearing had was not a fair one," the requirements of due process are met if the alien is given due notice of the charge and ample opportunity to prepare and present his case, with the aid of counsel if he so desires.

Prior to the Act, the commingling of investigative and fact finding functions banned by Section 5, 5 U.S.C. 1004(c), although unfavorably commented upon by some courts, was consistently held not to vitiate hearings otherwise fair. *Palmer* v. *Ultimo,* 69 F. 2d 1, 2 (C.A. 7); *Reynolds* v. *United States,* 68 F. 2d 346, 348 (C.A. 7); *In re Giacobbi,* 32 F. Supp. 508, 515 (N.D. N.Y.). In the *Sung* case, the practice of combining investigating, prosecuting, and adjudicating functions was pointed to as an abuse which the Act was particularly "intended to ameliorate" (p. 46), and subsequently, in *Harisiades* v. *Shaughnessy, supra,* objection again was made that, irrespective of the APA, procedural due process was violated when

"the same individual acted both as presiding officer and examining officer." *Ibid.*, p. 583-584. While this Court seems to have left that question open by rejecting Harisiades' contention on the basis of his having consented to the performance of both functions by one officer, the question is not present in the instant case, as petitioners contend (Pet. 11). Here, unlike both *Sung* and *Harisiades*, examining inspectors, who had been appointed to act in such capacity, presented the Government's case at hearings conducted by different officials, designated presiding inspectors, who performed the fact-finding function.[3] The fact that the presiding inspectors were not hearing examiners qualified under the Civil Service laws, pursuant to Section 11 of the Act, plainly is insufficient to establish a lack of due process in the absence of any showing of unfair or arbitrary conduct of the hearings or of rulings lacking any evidentiary support. There is nothing inherently unfair in using qualified examiners whose appointment was not under Civil Service, so long as their actions do not manifest bias or arbitrariness. Cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *Tisi* v. *Tod, supra.*

[3] Such separation of functions is now made mandatory in several classes of deportation cases. 8 C.F.R. (1951 Cum. Supp.) 151.2(f).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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